

ESTTA Tracking number: **ESTTA276010**

Filing date: **04/03/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186473
Party	Defendant Apex Pavers, Inc
Correspondence Address	Leslie A. Burgk Leslie A. Burgk, P.A. 900 East Ocean Blvd, Suite D-130 Stuart, FL 34994 UNITED STATES leslie@leslieburgk.com
Submission	Reply in Support of Motion
Filer's Name	Leslie A. Burgk, Esq.
Filer's e-mail	leslie@leslieburgk.com
Signature	/LAB/
Date	04/03/2009
Attachments	Reply to MTC.pdf (5 pages)(221931 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APEX, LLC)	
)	Opposition No. 91186473
)	
Opposer,)	Mark: APEX PAVERS (and design)
v.)	
)	Serial No.: 77/243,433
APEX PAVERS INC.)	
)	Filing Date: July 31, 2007
Applicant.)	
)	

**APPLICANT’S REPLY TO OPPOSER’S BRIEF IN SUPPORT OF ITS OPPOSITION
TO APPLICANT’S MOTION TO COMPEL**

Applicant, APEX PAVERS INC. (hereinafter the “Applicant”), by and through the undersigned counsel, hereby files Applicant’s Reply to Opposer’s Brief in Support of its Opposition to Applicant’s Motion to Compel, and further states as follows:

1. In the interest of keeping this reply brief short, the undersigned generally denies all allegations that the applicant and its counsel acted unreasonably or did not cooperate in good faith to resolve discovery disputes prior to filing its motion to compel. The applicant will allow the record to speak for itself.
2. A reply brief is however necessary to address the Opposer’s allegation that the Applicant’s motion to compel is moot in light of supplemental discovery. The Applicant maintains its position that certain discovery responses remain incomplete and that other issues raised, such as returning an executed protective agreement, and providing a privilege log pertaining to attorney-client/work product privileges remain outstanding. Counsel for both parties have again conferred but have not been able to reach a stipulation prior to Applicant’s deadline to file its reply brief. See correspondence attached hereto as Exhibit A. Opposer’s counsel has however expressed a

willingness to look into further supplementation and to copy and produce documents directly to applicant's counsel in the future.

3. Acknowledging its obligation pursuant to TBMP § 2.120(e), to inform the Board of any issues subsequently resolved by agreement of the parties or supplemental discovery that no longer require adjudication, the following are moot: interrogatory no. 7; interrogatory no. 8; interrogatory no. 10; interrogatory no. 11; interrogatory 13 (to the extent the Board determines Opposer is precluded from introducing evidence of sales based on its objections); interrogatory no. 14; interrogatory no. 15; request for production no. 4, and; request for production no. 5.


4. Those requests not specifically excluded above remain incomplete and unresolved for purposes of adjudication.

WHEREFORE, the Applicant respectfully requests that the Board GRANT the Applicant's Motion to Compel Discovery and grant any further relief the Board deems just and proper.

Dated: April 3, 2009

Respectfully Submitted,

LESLIE A. BURGK, P.A.

By:  /LAB/

Leslie A. Burgk

Attorney for Applicant

900 East Ocean Blvd, Suite D-130

Stuart, Florida 34994

Telephone 772.600.2677

Facsimile 772.408.8086

leslie@leslieburgk.com

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the undersigned has made a good faith effort by conference or correspondence, to resolve with the other party or the attorney therefore the issues presented in the motion and have been unable to reach an agreement.

By: /LAB/
Leslie A. Burgk

CERTIFICATE OF ELECTRONIC FILING

I HEREBY CERTIFY that the foregoing Motion is being submitted electronically through the Trademark Trial and Appeal Board's ESTTA System on this 3rd day of April 2009.

By: /LAB/
Leslie A. Burgk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the correspondent of record for the Opposer this 3rd day of April 2009 via First Class U.S. Postal Mail:

Ms. Brent Canning
Apex, LLC
100 Main Street
Pawtucket, Rhode Island 02860

By: /LAB/
Leslie A. Burgk

EXHIBIT A

YAHOO! SMALL BUSINESS
Email**Apex Pavers / Apex**

Thursday, April 2, 2009 11:35 AM

From: "Brent Canning" <bcanning@theapexcompanies.com>
To: leslie@leslieburgk.com
Cc: "Brent Canning" <bcanning@theapexcompanies.com>

Leslie – Thanks for your call this morning. I'm glad we were able to speak. I thought the call was reasonably productive and it eliminated some of the rhetoric.

You articulated concerns relating to our supplemental discovery responses. Among other things, I understand you would like to see the licensing agreements that are in place with third parties. As you know, we use a number of Apex marks and you have also asked us to identify which specific marks we are relying on in this case in the hopes of limiting the breadth of your discovery. You have suggested that we either drop the famousness claim, produce more evidence in support of that claim, or agree that what we have produced is all that we will produce. You also want us to identify if there are any goods that Apex sells that are branded "Apex" or instead whether the mark is used for services and promotion. There are other points we covered as well, including your request for a signed copy of the protective order.

I have not committed to producing any additional information or documents right now but did promise to evaluate your position and let you know what, if any, additional response I could agree to provide.

We ended our telephone conversation with a discussion about how to preserve your motion to compel while at the same time giving me some time to consider your points and for us to engage in some settlement discussions.

My suggestion is that we simply suspend this proceeding for a period of time to allow us to focus on a possible consent agreement of some sort. I believe that would preserve your rights and it would allow us to focus on something that would be more productive – a resolution.

I understand that you are going to give this issue some thought and get back to me today or tomorrow about how you think we ought to proceed.

I look forward to hearing from you and continuing to work productively.

Brent